Acquisition Reform Working Group

Key Legislative Issues for the Year 2003

ACQUISITION REFORM WORKING GROUP

- Membership: Aerospace Industries Association * American Consulting Engineers Council * American Council of Independent Laboratories * AeA * Contract Services Association of America * Electronic Industries Alliance * Information Technology Association of America * National Defense Industrial Association * Professional Services Council * U.S. Chamber of Commerce

- Represents virtually every element of the Government contracting community – including large and small businesses, manufacturers and service companies. Formed in 1993 to address the Section 800 panel report (which led to the 1994 Federal Acquisition Streamlining Act). Continues to annually develop legislative proposals aimed at sustaining our national technology and industrial base, and improving Government access to commercial technologies.

ISSUE: Authorize Additional Contract Types in FAR Part 12

- **Background:** Section 8002 of the 1994 Federal Acquisition Streamlining Act (FASA) requires the use of firm-fixed price or fixed price with economic price adjustment contracts *to the maximum extent practicable* for commercial item contracts. ARWG believes that Congress *did intend* to authorize the use of contract types *other than* fixed-price or fixed-price with economic price adjustment, when appropriate to the commercial marketplace.

- **Need for Change:** Time and Material (T&M) contracting allows for a rapid response and is administratively simple for both the buyer and the seller. T&M contracts are particularly useful when the scope of work cannot be definitively established so as to permit a firm-fixed price proposal. The customer will pay only for the effort required and both parties know that the services can be terminated or extended at the customer's discretion. *Each of these options is seen as a positive cost control measure.*

- **Recent Steps Taken:** In the Senate report accompanying the FY01 National Defense Authorization Act, the Senate Armed Services Committee recommended that the Department of Defense (DOD) utilize the flexibility provided by FASA to allow the use of other than firm-fixed price contracts for the acquisition of ancillary commercial services when this is the customary practice in sales to the general public. This recommendation has not been incorporated into the regulations.

- **Recommendation:** Further clarification of the statute is required to be more specific about the contract types that may be used to acquire commercial items. [The *Services Acquisition Reform Act of 2002* (H.R. 3832) included a provision to make this change. The 2003 version of SARA is expected to again include this provision.]

ISSUE: Clarify Definition of Commercial Services

- **Background:** The 1994 Federal Acquisition Streamlining Act (FASA), and its implementing regulations, contained significant and important new language defining a commercial item. Thus, allowing the Federal government to have greater access to previously unavailable advanced commercial products and technologies, which has resulted in millions of dollars in savings to the taxpayer.

- **Need for Change:** Significant barriers remain, however, for the sale of commercial services that are sold independently of the sale of a commercial item. The standards imposed for sale cannot be met by an increasingly large part of the commercial services industry. Services and supplies are sufficiently different that their commerciality cannot always be determined using the same measuring sticks as products, e.g., a “catalog or market price” may exist for a supply but will not facilitate establishing the commerciality of a “commercial service.”

- **Recent Steps Taken:** Section 821(b) of the FY01 National Defense Authorization Act (P.L. 106-398) established a preference for performance-based contracts for services. Any performance-based service contract or performance-based task order under $5 million would be treated as a commercial contract and could be purchased using the simplified commercial procedures under FAR Part 12. This provision expands upon the pilot program for certain commercial services (*i.e.,* utilities and housekeeping services, education and training services, and medical services) originally authorized in section 814 of the FY00 National Defense Authorization Act (P.L. 106-65). This authority expires on October 30, 2003 and applies only to the DOD.

- **Recommendation:** Amend the statute to include “services” in the definition of “commercial item.”

ISSUE: Improve Competitive Sourcing of Commercial Activities

- **Background:** Current statutes and existing Federal implementation policies unduly limit the flexibility of the Federal government to fully utilize competitive sourcing, outsourcing, and privatization options to achieve the performance of commercial activities more efficiently and at lower total operating cost.

- **Need for Change:** Competitive sourcing, outsourcing and privatization are among the most prominent and important issues facing the Department of Defense (DOD) and civilian agencies. Indeed, much of what has been accomplished in the area of acquisition and logistics reform can and must now be applied to a more aggressive and comprehensive policy of competing commercial activities currently performed by Government agencies. Moreover, how and where such competitions are conducted is a key to meeting the President's management reform agenda.

- **Recent Steps Taken:** Chief Financial Officers Act of 1990, 1993 Government Performance and Results Act 1998 Federal Activities Inventory Reform Act, 2002 Commercial Activities Panel Report, November 2002 Revisions to Circular A-76.

- **Recommendation:** Consistent with the CAP Panel's recommendation, ARWG strongly supports amending 10 U.S.C. 2462(a) to authorize the Department to evaluate public-private competitions on any basis that is appropriate for achieving the requirement.

ISSUE: Extend Prompt Pay Act Interest Payments Beyond 12 months

- **Background:** Under the Prompt Payment Act (31 U.S.C. 3901), agencies that fail to make timely payment on proper invoices submitted for payment are required to automatically pay interest on those late payments – but only for the first twelve months. After that 12-month time period has passed, interest no longer accrues, and the government has no incentive to make timely payments of both the principal and interest owed; in many instances, as agencies approach their twelve month obligation window, there are incentives to not make payment on the underlying invoice.

- **Need for Change:** When the Prompt Payment Act was significantly updated in 1988, Federal agencies denied that they failed to make payments in a timely manner, but, in every case, agreed that payments (and interest on those payments) should be made within twelve months after a proper invoice is received by the agency. Thus, as an element of cash management and budget scoring, regulations limit to twelve months the Federal government's obligation to pay interest on overdue payments. However, since the enactment of the Prompt Payment Act amendments, there are examples where, as the twelve-month window approaches, Federal agencies divert funds to other contract payments so as to lower their outstanding payments and improve their payment statistics.

- **Recommendation:** ARWG recommends repealing the twelve month cap on a Federal agency's obligation to pay interest on overdue proper invoices under the Prompt Payment Act.

ISSUE: Improve Contract Closeout Process

- **Background:** Before a Federal agency and a contractor can jointly close out any Federal contract, both parties must complete certain detailed accounting and management reporting actions. This process, governed by federal law and the Federal Acquisition Regulation, typically occurs many years after final actual performance of the contract.

- **Need for Change:** Contract closeout is often viewed by Government and contractor officials as a clerical, low-attention, low affect activity. Until these contracts can be closed out, both agencies and contractors are required to keep the records available and accessible, the contracts are subject to modification if laws or certain types of future regulations governing costs are adopted. Furthermore, agencies are unable to shut down antiquated financial payment or reporting systems, or move to new financial payment and reporting systems, without transferring data on these open contracts to any new system.

- **Recent Steps Taken:** Defense Department is undertaking a modernization process of its financial structures that is aimed at addressing this problem.

- **Recommendation:** several statutory changes be made. Some of these changes will address only the current backlog of open contracts at DOD; others will take steps to minimize a recurrence of an extensive backlog of those open contracts.

ISSUE: Simplify the Process for Compliance with the Berry Amendment

- **Background:** The government has a long history of protecting domestic industries through restrictions on procurement policies (e.g., the Berry Amendment which was enacted in 1942).

- **Need for Change:** DOD needs greater flexibility in implementing the statute through broader waiver authority and more flexible compliance approaches, particularly given the realities of the war on global terrorism and the evolution that has occurred in the way U.S. industry does business since 1942. Also, there is a need to correct an unintended negative impact on domestic suppliers compared to foreign sources vis-à-vis products containing specialty metals. Finally, there needs to be more flexibility in the exemptions to maximize best value, competition and interoperability.

- **Recent Steps Taken:** The Department of Defense has developed a proposal that would significantly improve implementation, compliance with, and enforcement of the Berry Amendment, particularly with respect to the requirements for specialty metals. The proposal provides a better balance between achieving the benefits of competition and preserving the interests of specialty metal producers. This is a narrow proposal that would continue the existing preferences for U.S. produced fibers, yarns, textiles and textile products without change.

- **Recommendation:** ARWG supports a legislative initiative to clarify and update 10 U.S.C. 2533a (domestic source restrictions) to make it easier and less expensive for U.S. producers and manufacturers to sell commercial products to the DOD, without altering the current domestic preference requirements for textiles and apparel items.

ISSUE: Improve Contracting with Small Businesses

- **Background:** Small and Small Disadvantaged Business (S/SDB) suppliers are valued partners in all sectors of the defense industry. ARWG is committed to leveraging the varied capabilities and innovation of these companies and others and to helping them grow and prosper. A number of factors, however, are eroding industry's ability to award contracts to S/SDB's.

- **Need for Change:** Over the past three years, industry, in general, has achieved its small business goals (running approximately 40%) but has struggled to achieve the SDB, WOB and DVB goals. On the other hand, DOD is having difficulty achieving any of the goals at its major buying centers. Major factors working against industry achieving its goals in the future: (a) certification requirements; (b) inability to count subcontracts toward meeting goals.

- **Recommendation:** A legislative clarification on the Third Party Certification is needed that would relieve contractors of the requirement to count only *certified* SDB's in their subcontracting reports. Action should be taken to allow reporting at subtier levels.

OTHER ARWG ISSUES

- Expand Preference for Performance-Based Services Acquisition
- Extend Application of Simplified Acquisition Procedures to Certain Commercial Items

- Modify the Definition of Commercial Items (10 U.S.C. 2464)
- Provide Trade Agreements Act Exemption for Information Technology Commercial Items
- Revise Remedies Provisions under the Civil False Claims Act
- Revise Use of Commercial Leasing by the Government

- Treat Items and Services from a “Commercial Entity” as Commercial Items

- Waive Government Rights to Commercially Developed Intellectual Property

- Eliminate Impediments to “Other Transaction” Contracting Authority

- Revise Internal Revenue Code to Ensure Taxes are Fairly Calculated and Paid

- Treat Sales to Foreign, State, and Local Governments as Commercial Sales

- Reform Environmental Liability Statutes
- Stabilize Defense Funding – Multi-Year Contracting Authority
- Reform Export Control Laws
- Revise DOD Export Loan Guarantee Program
- Repeal Mandatory Source Requirement for the Federal Prison Industries

- Revise the Service Contract Act